

very great strength from the very restraint with which the case for the appellant was urged upon us. Nevertheless we are of the opinion that the appeal should be dismissed.

It has never been in question that about 7th December, 1958, one Abu Kassim was brutally murdered by a number of persons. As far as the present appellant is concerned the question the jury had to decide was whether or not he was one of the persons who took part in that murder. There was a considerable body of evidence which if it was believed showed that he was one of those persons. There was the evidence of an accomplice — a person who had been originally charged but turned King's evidence. There was the evidence of a confession made by the appellant himself before a Magistrate which, if it was believed, implicated the appellant and corroborated the accomplice's evidence up to the hilt.

The question we have to decide here in the light of the way the appeal has been urged upon us, and in our view it was the only way in which it could have been urged upon us, was whether or not the jury was properly and sufficiently directed in relation to that evidence. Our attention has been invited to one or two passages in the trial Judge's summing-up which considered in isolation we cannot approve.

In particular we very much doubt the wisdom of the practice which seems to be on the increase nowadays of quoting the actual words of the Evidence Ordinance to juries. It has been said both in India and here that it is very much to be doubted whether quoting the actual words of the Evidence Ordinance as they stand can be of any great assistance to a jury.

Again there was one passage which considered strictly in isolation suggested that the jury might be justified, if it was so disposed, in disregarding the seriousness of the offence of murder as a capital offence in evaluating and weighing the evidence before them.

Nevertheless, reading the summing-up as a whole we are satisfied that in the end any reasonable jury must have realized that it was their duty to acquit if having regard to everything they were not fully satisfied in their consciences as to the guilt of the accused.

In the circumstances we have no alternative but to dismiss the appeal.

Appeal dismissed.

K. S. PANICKER v. INDIAN OVERSEAS BANK LTD.

[O. C. J. (Ambrose J.) April 25, 1959]

[Singapore — Suit No. 1575 of 1955]

Employment — Contract of — Emigrant bank clerk — Basic salary — Termination of service — Claim for salary and allowances and for damages for breach of contract and wrongful dismissal.

A *Master and servant — Emigrant bank clerk — Terms of employment — Indian Emigration Act, 1922 — Form of permission and Form of application and letter to Protector of Emigrants — Admissibility under Evidence Ordinance (Cap. 4), ss.92 and 93.*

Estoppel — Res judicata.

B In this case the plaintiff claimed salary and allowances under a contract of employment and damages for breach of contract and wrongful dismissal. The plaintiff entered the service of the defendant in India as a clerk in 1949, having agreed to abide by the rules and regulations applicable to the defendant's employees. About 9 months later he applied for a transfer to an oversea branch, undertaking to adhere fully to the terms and conditions of oversea service. In due course the defendant decided to transfer him to its Singapore branch. The defendant had to obtain the permission of the Protector of Emigrants, Madras for such transfer. On May 22, 1951, the defendant signed a form of application for such permission in triplicate, and the plaintiff also signed the form, expressing thereon his acceptance of the terms therein. On the same day both parties signed another form in triplicate below the words "Accepted the above terms". The next day the plaintiff presented to the Protector an unsealed envelope containing a letter from the defendant and both forms. The Protector granted the necessary permission subject to certain terms and conditions. Soon afterwards the plaintiff sailed from Madras and arrived in Singapore on June 4, and started work at the Singapore branch of the defendant shortly after. By a letter dated January 10, 1955, the defendant terminated the plaintiff's service with immediate effect for alleged gross misconduct and insubordination and sent him a pay order for a month's salary and allowances in lieu of a month's notice. This pay order was returned by the plaintiff.

Held: (1) the terms of the agreement between the plaintiff and the defendant were set out not only in the form of permission but also in the form of application and in defendant's letter to the Protector dated May 22, 1951, which accompanied the form of application;

F (2) there was no inconsistency between the Bank's previous conduct in Suit No. 475 of 1955 and the defence contained in para. 3A of the Further Amended Defence in this Suit, namely, that conditions 10, 12, 14 and 15 of the form of permission did not form part of any contract of employment between the parties;

(3) there was no violation of the provisions of section 25(2) of the Indian Emigration Act, 1922;

G (4) as the contract of employment consisted not only of the form of permission but also the form of application and para. 2 of the defendant's letter to the Protector, all three documents were admissible as evidence under section 92 of the Evidence Ordinance, and no evidence of any oral agreement or statement could be admitted by the Court in contravention of section 93 of the Evidence Ordinance for the purpose of contradicting, varying, adding to, or subtracting from the terms of the contract of employment;

H (5) the defendant was not estopped from saying that the terms and conditions of the plaintiff's service were less favourable than those contained in the form of permission;

(6) the plaintiff was estopped from saying that the sum of \$184.50 set out in para. 5 of the form of application represents his basic monthly salary;

I (7) as it was decided in Suit No. 475 of 1955 between the same parties that the contract of employment expired on May 23, 1954, the matter must be regarded as *res judicata*, and the plaintiff was precluded from contending the contrary;

(8) as the plaintiff was employed on a month to month basis after the termination of the three-year contract, one month's notice of termination of his service was reasonable and the claim for damages for breach of contract and wrongful dismissal must therefore be dismissed.

Case referred to:—

- (1) *Emperor v. Jeevanji* I.L.R. 31 Bom. 611.

CIVIL SUIT.

C. H. Smith for the plaintiff.

J. L. P. Harris for the defendant.

Cur. Adv. Vult.

Ambrose J.: This is a claim for salary and allowances under a contract of employment and for damages for breach of contract and wrongful dismissal. The claim arises in these circumstances. On the 28th May, 1949, the plaintiff entered the service of the defendant in India as a clerk, having agreed to abide by the rules and regulations applicable to the defendant's employees. About nine months later, he applied for a transfer to an oversea branch, undertaking to adhere fully to the terms and conditions of oversea service. In due course the defendant decided to transfer him to its Singapore branch. The defendant had to obtain the permission of the Protector of Emigrants, Madras, for such transfer. On the 22nd May, 1951, the defendant signed a form of application for such permission in triplicate, and the plaintiff also signed the form, expressing thereon his acceptance of the terms therein. On the same day both parties signed another form in triplicate below the words "Accepted the above terms." This form (which I will call the form of permission) was entitled

"PROCEEDINGS OF THE PROTECTOR OF EMIGRANTS, MADRAS, PERMISSION TO ENGAGE, OR ASSIST TO EMIGRATE."

The next day the plaintiff presented to the Protector an unsealed envelope containing a letter from the defendant and both forms. The Protector granted the necessary permission subject to contain terms and conditions.

The plaintiff sailed from Madras on or about the 26th May, 1951, and arrived in Singapore on the 4th June, and started work at the Singapore branch of the defendant shortly after. By a letter dated the 10th January, 1955, the defendant terminated the plaintiff's service with immediate effect for alleged gross misconduct and insubordination and sent him a pay order for a month's salary and allowances in lieu of a month's notice. This pay order was returned by the plaintiff.

In order to decide the issues in this suit, it is necessary, first, to examine the relevant provisions of Chapter IV of the Indian Emigration Act, 1922. Section 16(1) provides that whoever desires to engage any person to emigrate for the purpose of skilled work shall apply for the permission of the Central Government. Under section 2(f) "skilled work" includes working as a clerk. Section 16(2)(b) provides that the terms of the agreement under which a person is to be engaged to emigrate for the purpose of skilled work shall be stated in the application for permission. Section 17 provides that the Central Government may, after such inquiry as it may

A deem necessary, grant the permission applied for on such terms and conditions as it thinks fit. Section 20 provides that the Central Government may by notification in the Official Gazette authorise a Protector of Emigrants to receive and dispose of applications made under Chapter IV. Section 18(1) provides that before the engaged person departs from India the person by whom he has been engaged shall appear in person or by his duly authorised agent before the Protector of Emigrants at the port of embarkation with the engaged person. Section 18(2) provides:—

"If it appears to the Protector of Emigrants —

- (a) that permission to engage or assist such person has been duly obtained,
B
C (b) in the case of an engagement, that the terms of the agreement under which such person has been engaged are in accordance with the terms of the permission granted and are understood by him, and
(c) that the conditions on which the permission was granted have been complied with,

D he shall register in a book to be kept for the purpose such particulars concerning the person engaged and the person engaging him as the Central Government may prescribe."

It is necessary, next, to consider what the Protector actually did. On the 23rd May, 1951, the Protector granted the necessary permission, stating in the first paragraph of the form of permission that it was subject to the terms and conditions agreed to by the defendant in its application and the further conditions set out in the form of permission. He then proceeded to issue a certificate that the defendant had been permitted by him to engage the plaintiff to emigrate for the purpose of skilled work and that the requirements of Chapter IV of the Indian Emigration Act, 1922, and of the rules thereunder had been fulfilled. It is reasonable to infer from the certificate that the Protector had satisfied himself under section 18(2) of the Act that the terms of the agreement under which the plaintiff had been engaged were in accordance with the terms of the permission granted. No additional document containing the terms of the agreement under which the plaintiff had been engaged was submitted to the Protector to enable him to compare the terms of the agreement with the terms of the permission. The conclusion is irresistible that, as far as the Protector was concerned, the terms of the agreement under which the plaintiff had been engaged were set out in the form of application as well as the form of permission.
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I The main contention urged on behalf of the plaintiff was that the form of permission dated the 23rd May, 1951, was the contract of employment between the plaintiff and the defendant. My own view is the same as that which I am compelled to conclude was the view of the Protector, namely, that the terms of the agreement between the plaintiff and the defendant were set out not only in the form of permission but also in the form of application. Paragraph 5 of the form of application sets out the terms of the agreement under which the plaintiff was to be engaged as follows:—

- (a) Period of employment — Not less than three years.
- (b) Rate of pay per mensem — Straits \$184.50.
- (c) Boarding whether free at employer's cost — No.
- (d) Lodging whether free at employer's cost — No.
- (e) Clothing whether free at employer's cost — No.
- (f) Other items — Governed by the Rules & Regulations of the Bank.

The fact that the plaintiff signed the form of application below the words "Accepted the above terms" strongly supports my view. According to paragraph 5 of the form of application "other items" are to be governed by the rules and regulations of the defendant. To ascertain what items are so governed, it is necessary to refer to paragraph 2 of the defendant's letter to the Protector dated the 22nd May, 1951, which accompanied the form of application. This paragraph states quite clearly that conditions 10, 12, 14 and 15 in the form of permission are not applicable to the defendant as the conditions of service of the defendant's employees are governed by the rules and regulations of the defendant. This paragraph, in my judgment, must be regarded as a term and condition of the defendant's application amplifying paragraph 5 of the form of application. As this paragraph of the letter was not disallowed by the Protector, it must have been accepted by him.

The next submission made on behalf of the plaintiff was that the defendant could not approve and reprobate the agreement embodied in the form of permission. This submission was based on the following passage in 15 Halsbury's Laws (3rd Ed.) 171, para. 340:

"On the principle that a person may not approve and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais. The principle that a person may not approve and reprobate expresses two propositions, first, that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and, second, that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent."

Counsel for the plaintiff referred to Suit No. 475/55 in this Court in which the present defendant, The Indian Overseas Bank Ltd., was the plaintiff and the present plaintiff, Mr. K. S. Panicker, was the defendant. In that suit the Bank sought an injunction to restrain Mr. Panicker from entering and remaining upon quarters belonging to the Bank. Counsel for Mr. Panicker moved the Court for a stay of proceedings on the ground that by an agreement in writing dated the 23rd May, 1951, (that is, the form of permission), the parties had agreed to refer disputes arising out of the agreement to arbitration. In that case it was contended on behalf of the Bank that the agreement referred to by Mr. Panicker had come to an end on the 23rd May, 1954, as it concluded with the words "The period of engagement expires on 23.5.54." The Chief Justice refused to stay the proceedings holding that the agreement had come to an end on the 23rd May, 1954, and that therefore the

arbitration clause did not apply. Counsel for the plaintiff argued before me that the defendant having based its case in Suit No. 475/55 on the agreement embodied in the form of permission could not throw it overboard and say that the contract of employment was based on the defendant's rules and regulations. In my opinion there is no inconsistency between the Bank's previous conduct in Suit No. 475/55 and the defence contained in paragraph 3A of the Further Amended Defence in this suit, namely, that conditions 10, 12, 14 and 15 of the form of permission did not form part of any contract of employment between the parties.

The third point raised on behalf of the plaintiff was that the imposition of terms not in the permission given by the Protector of Emigrants was unlawful under section 25(2) of the Indian Emigration Act, 1922. In my view no such terms were imposed by the defendant. The sub-section reads:

"Whoever, except in conformity with the provisions of this Act or of the rules made under this Act, —

- (a) makes, or attempts to make, any agreement with any person purporting to bind that person, or any other person to emigrate . . . shall be punishable with fine, which may extend to five hundred rupees."

The only agreement which could be alleged to be a breach of this sub-section was that arising out of the acceptance by the defendant on the 6th December, 1950, of the plaintiff's offer of the 18th February, 1950, to be transferred overseas on the conditions of overseas service applicable to the defendant's employees. It must be borne in mind, however, that there was never at any time any intention on the part of the defendant to flout the provisions of the Act. The agreement entered into on the 6th December, 1950, was regarded by the defendant as conditional on the necessary permission being obtained from the Protector. The letter dated the 6th December, 1950, which conveyed the decision to transfer the plaintiff to its Singapore branch was accompanied by a form of application for the permission of the Protector and contained a request that the form be filled in and signed by the plaintiff and returned to the defendant. There was, in my judgment, no violation of the provisions of section 25(2) of the Act. Counsel for the plaintiff cited the case of *Emperor v. Jeevanji*,⁽¹⁾ in support of his contention. I consider that case irrelevant as it dealt with an offence under section 107(1) of the Indian Emigration Act, 1883, as amended by Act No. X of 1902, which reads:

"Whoever without having first obtained the permission of the Local Government referred to in section 107 sub-section 1, enters or attempts to enter into an agreement purporting to bind any native of India to depart by sea out of India for any of the purposes specified in the said sub-section shall, on conviction . . . be punishable with fine which may extend to Rs. 250 . . ."

This provision requires the prior permission of the Local Government before an attempt can be made to enter into an agreement purporting to bind a native of India to emigrate for any specified purpose. Section 25 of the Indian Emigration

Act, 1922, however, does not contain any such requirement.

Sections 92 and 93 of the Evidence Ordinance were invoked on behalf of the plaintiff to support the next submission, which was as follows: the terms of the contract of employment having been reduced to the form of a document, namely, the form of permission, no evidence could be given in proof of the terms of the contract except the document itself; no evidence of any oral agreement or statement could be admitted for the purpose of contradicting, varying, adding to or subtracting from its terms. In my opinion the terms of the contract of employment are identical with the terms of the permission. The terms of permission are set out not only in the form of permission but also in the form of application. The exclusion of conditions 10, 12, 14 and 15 from the form of permission by paragraph 2 of the defendant's letter to the Protector of the 22nd May, 1951, was a term and condition of the defendant's application amplifying paragraph 5 of the form of application. As the contract of employment consisted not only of the form of permission but also the form of application and paragraph 2 of the letter, all three documents were admissible as evidence under section 92 of the Evidence Ordinance. No evidence of any oral agreement or statement was admitted by me in contravention of section 93 of the Evidence Ordinance for the purpose of contradicting, varying, adding to or subtracting from the terms of the contract of employment.

The fifth point taken on behalf of the plaintiff was that the defendant was estopped from saying that the terms and conditions of the plaintiff's service with the defendant were less favourable to the plaintiff than those contained in the form of permission. According to paragraph 23 of the Reply and the particulars delivered subsequently, the estoppel was said to arise from a representation made in May, 1951, at the defendant's Central Office at Madras by one Miss A. M. Lakshmi, an officer of the defendant's Staff Department. The alleged representation was to the effect that the plaintiff's terms and conditions of service were those contained in the form of permission, which Miss Lakshmi described as the agreement between the plaintiff and the defendant. In his evidence, however, the plaintiff merely said that he was not told by Miss Lakshmi that what he would receive from the Bank would be different from what was stated in the form of permission. The plaintiff testified that he was informed by Miss Lakshmi of the Staff Department at the defendant's Central Office, Madras, that his basic monthly salary would be \$184.50, and that she instructed him to insert "St. \$184.50" as his basic salary in condition 12 of the forms of permission. This allegation was incredible. I found it hard to believe that a responsible officer in the Bank would inform the plaintiff that his basic monthly salary would be higher than that laid down in the defendant's Staff Circular No. 5 of 1951 dated

A the 5th April, 1951. I found it even more difficult to believe, after hearing the evidence of Mr. P. L. Annamalai, who, like the plaintiff, was employed as a clerk by the defendant in India on a basic monthly salary of seventy-three rupees, and who was transferred to the defendant's Singapore branch together with the plaintiff. Mr. Annamalai was with the plaintiff at the defendant's Central Office on the 22nd May, 1951. He testified that he was told on that day by the Staff Department at the Central Office that his total monthly pay including allowances in Singapore would be \$184.50.

C The plaintiff further testified that Miss Lakshmi's statement as to his basic monthly salary was one of the main things which induced him to come to Singapore. This allegation I considered to be false. I could not believe it, as the plaintiff's decision to come to Singapore was made on the 18th February, 1950, that is more than a year previous to his alleged conversation with Miss Lakshmi, when he applied for a transfer to an overseas branch, undertaking to adhere fully to the defendant's terms and conditions of overseas service. I was satisfied that before the 22nd May, 1951, the plaintiff had seen the defendant's Staff Circular No. 5 of 1951, according to which, with effect from the 1st February, 1951, the revised scales of pay applicable to the defendant's officers in India would apply to its officers in Malaya, dollars being substituted for rupees. I was satisfied that the defendant must, therefore, have known before his alleged conversation with Miss Lakshmi that his basic monthly salary in Singapore would be seventy-three dollars, as his basic monthly salary in India was then seventy-three rupees.

F It was stated by the plaintiff in the Particulars relating to paragraph 23 of the Reply that on the day Miss Lakshmi made the representation referred to above, a similar representation was made by Mr. M. R. Govindaraj, an officer attached to the Travel Department of the defendant. In his evidence, however, the plaintiff merely said that he was not told by Mr. Govindaraj that what he would receive from the Bank would be different from what was stated in the form of permission. Mr. Govindaraj himself testified that he never made any such representation to the plaintiff. In my judgment the plaintiff has failed to establish the estoppel alleged.

H Counsel for the defendant contended that the plaintiff, having undertaken by letter dated the 18th February, 1950, to adhere fully to the terms and conditions of overseas service, was estopped from saying that the words and figures in paragraph 5 of the form of application,

I "Rate of pay per mensem — Straits \$184.50", meant that his basic monthly pay was to be \$184.50. Under the defendant's Staff Circular No. 5 of 1951 dated 5th April, 1951, the plaintiff was entitled on transfer to Singapore to the substitution of a basic monthly salary of \$73 per mensem for the basic monthly salary of seventy-three rupees drawn by him in India. Under the

same circular a high cost of living allowance was payable in accordance with local awards or as advised by the Central Office, Madras. According to a letter dated the 31st March, 1951, from the Assistant General Manager of the Foreign Department of the defendant at Madras to the Agent of the defendant at Singapore, the high cost of living allowance payable to a clerk at Singapore was \$75. Under the defendant's Staff Circular No. 41 of 1949, an oversea allowance was payable to the plaintiff at the rate of 50% of basic salary, i.e., \$36.50. The total monthly pay of the plaintiff according to the terms and conditions of oversea service was, therefore, \$184.50. In my opinion the plaintiff is estopped from saying that the sum of \$184.50 set out in paragraph 5 of the form of application represents his basic monthly pay.

Having come to the conclusion that conditions 12 and 15 formed no part of the contract of employment, I dismiss the claim for arrears of salary based on the basic monthly salary of \$184.50 which was unjustifiably inserted by the plaintiff himself in condition 12 of the form of permission, the claim for a gratuity of one month's salary on the completion of every year of service based on condition 12, and the claim for a conveyance allowance based on condition 15.

I dismiss the claim for overtime pay under condition 13 as the plaintiff did not impress me as an honest witness and as he adduced no evidence to corroborate this claim. I am unable to believe that the plaintiff worked overtime for a period of 173 weeks from the 4th June, 1951, to the 1st November, 1954, at an average of 13 extra hours of work per week.

I turn now to the second part of the claim, namely, the claim for damages for breach of contract and wrongful dismissal. Counsel for the plaintiff argued that the contract of employment was not merely for three years but for a limit of five years. He relied on condition 19 in the form of permission which reads:

"The terms and conditions of engagement shall remain in force for not less than two years and not more than five years from the date of engagement in India, and shall be renewable for further period to be stipulated in writing by the mutual consent of the parties."

In my opinion this condition is qualified by the last line of the form of permission:

"The period of engagement expires on 23.5.54." As, however, it was decided in Suit No. 475/55 between the same parties that the contract of employment expired on the 23rd May, 1954, I regard the matter as *res judicata*, and hold that the plaintiff is precluded from contending the contrary of the point found against him in that suit.

Counsel for the plaintiff further argued that the plaintiff was entitled to reasonable notice of termination of his service and that one month's notice was not reasonable as he had not been engaged locally. In my opinion, as the plaintiff was employed on a month to month basis after the termination of the three-year contract, one

A month's notice of termination of his service was reasonable in the circumstances, and payment of one month's salary and allowances in lieu of one month's notice was all that he was entitled to.

I accordingly dismiss the claim for damages for breach of contract and wrongful dismissal, and order that the plaintiff pay the defendant the costs of this suit.

Claim dismissed.

Solicitors: *Donaldson & Burkinshaw; Brad-dell Bros.*

C ABDUL RAHMAN BIN CHE MAT v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good J.J.A.)
November 2, 1959]

[K.L. — F.M. Criminal Reference No. 4 of 1959]

D *Courts — Jurisdiction — Magistrate's Court trial presided over by 1st Class Magistrate who is also President, Sessions Court — Sentence exceeding 12 months' imprisonment — Courts Ordinance, 1948, ss.59, 64, 76, 77, 81, 82, 84, 85, 87, 88 and 104 — Criminal Procedure Code (Cap.6), ss.3 and 121.*

E The powers and jurisdiction of the Magistrates' Court are exercised by the Court but their extent depends on whether at any particular stage of any particular case it is presided over by a First Class or a Second Class Magistrate. In either case it may take cognisance of and exercise jurisdiction in relation to any criminal case falling within section 84 of the Courts Ordinance. If it is presided over by a Second Class Magistrate it may not hold any preliminary inquiry or proceed to the final trial and determination of any cause or matter which does not come within the scope of section 88.

COURT OF APPEAL, Criminal Reference under section 34, Courts Ordinance.

H. L. Wigglesworth for the appellant.

Mohamed Salleh bin Abas (Federal Counsel) for the respondent.

G The judgment of the Court of Appeal was delivered by,

Thomson C.J.: This appeal, which has come before us for re-hearing under the provisions of section 34 of the Courts Ordinance, was originally heard and determined by Neal J., at Kota Bharu.

H The appellant was convicted at Kota Bharu for house-breaking by night in order to the committing of theft in contravention of section 457 of the Penal Code, the value of the property involved being something over a thousand dollars. He was sentenced to two years' imprisonment.

I He appealed against his conviction on a number of grounds with which we are not concerned here beyond observing that in our opinion they were without substance. He also appealed against his sentence on the ground that the Court in which he was convicted was a Magistrate's Court presided over by a First Class Magistrate and therefore had no power to impose a sentence